se rule. *Id.* Just as a patient forced (because a hospital has market power) to purchase a package of hospital and anesthesiological services is discouraged from hiring another anesthesiologist, a licensee required to take a package license is discouraged from licensing alternatives to the tied patents. Existing providers of alternatives to the tied patents are likely to be harmed, and entry into the market for tied technology is likely to be inhibited. In approving package licenses of patent pools, the DOJ recognized this threat and required safeguards, such as individual licensing, to ensure it did not occur. *See* DOJ, Business Review Letter at 10-11 (Dec. 16, 1998), http://www.usdoj.gov/atr/public/busreview/2121.pdf (hereinafter DVD Ltr.); MPEG Ltr. at 9-11.

In contending its licenses present no such anticompetitive threat, Philips argues that block-booking "could not injure competition" if it did not require exhibition of the films and there was no incremental charge for each film. Opp. 13. To the contrary, competition would still be injured because licensees would be discouraged from licensing alternatives to the tied films. The rule against tying does not turn on being required to devote time slots to films. It reflects the fact that tying distorts choice in the market for the tied item by virtue of the need to purchase the tying item and the difficulty of evaluating the true cost of each item when they are offered only as a package. *See Jefferson Parish*, 466 U.S. at 15 ("the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package").

Moreover, if a film distributor engaging in block-booking could avoid the *per se* rule simply by contending that it did not "charge[] any more for the entire package than licensees were prepared to pay for just the 'tying' films," as Philips posits (Opp. 13), then the *per se* rule against tying would be meaningless. A tying party can always contend that the entire cost of the package is due to the tying item

(over which it has market power), and that the tied item is free; if they are only offered as a package, there will be no evidence to contradict this.[4] Application of the *per se* rule against tying does not turn on ferreting out through expert testimony what the price would have been but for the tie. The *per se* rule exists, in part, due to the difficulty of such judicial inquiry.[5] *See Jefferson Parish*, 466 U.S. at 16 n.25.

3. This case is an excellent vehicle to revisit the *per se* rule against tying in the important modern context of package licensing. There can be no serious dispute that market power was proven (App. 10a-11a) and that the tying and tied patents were in fact tied together in a mandatory package license (App. 3a). This case invites application of the *per se* rule, but the Federal Circuit created a special exception from the rule for package licensing of patents, and crafted a more forgiving rule.

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[4] While there is no evidence of patent-specific royalties here since Philips insisted on package licenses from the start, there was a rare opportunity to see the effect on price from breaking up a mandatory joint package license, since the licensors were forced to begin licensing their own CD-R patents separately in response to the Taiwan FTC investigation. App. 255a-256a. The total of the royalties they could obtain on their own was lower than the royalty that they extracted by pooling their patents together in the mandatory joint license, (App. 243a, 255a-56a), demonstrating that their collusive patent-to-patent tying facilitated extraction of a supracompetitive royalty. The royalties were so high—50 to 70 percent of the average net selling price at the time of trial—that Petitioners would have gone out of business (other manufacturers received more favorable treatment due to Philips's price discrimination which is not before this Court) and had to resort to contesting Philips's licensing practices in court. App. 242a-43a, 265a-68a.

[5] Showing that a tying party charged a supracompetitive price for the package is simply one (likely difficult) way to prove market power. *See* 466 U.S. at 27 n.46 ("market power exists whenever prices can be raised above the levels that would be charged in a competitive market"). It is not, however, a litmus test for an unlawful tying arrangement.

Philips's arguments that the posture of this case renders it inappropriate for review are mere distractions. The decision below is not "interlocutory," as Philips claims, because it was a final decision on whether the *per se* rule against tying applies. Opp. 17. The Commission is bound by this decision, so there will be no further consideration of the rule. The parallel district court action was remanded for further consideration in view of this decision, *U.S. Philips Corp. v. Princo Corp.*, No. 05-1388, 2006 WL 774601 at *3 (Fed. Cir. Mar. 27, 2006) (unpublished), and even Philips recognizes "it is binding authority" in that action. Philips' Submission Regarding the Limited Scope of the Remand and the Status of the Case at 1 n.1, *U.S. Philips Corp. v. Princo Corp.* (S.D.N.Y.) (Nos. 02-CV-246, 04-CV-2825). Philips's complaint that "review by this Court could well postpone any possibility of effective relief" presumptuously assumes that Philips, and not Petitioners, are entitled to relief. Opp. 17. Moreover, this could be said in nearly every case presented for review. It is no reason to disregard the conflict with this Court's precedent and exceptional importance of the issue presented.

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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